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IN THE

Supreme Court of the United States

No. [redacted] 73

SAMUEL R. BEARD, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Samuel R. Beard, by his counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the District of Maryland, at Baltimore.

OPINION BELOW

The District Court wrote no Opinion. The Opinion of the Court of Appeals, attached to this Petition, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1955. The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254, of the United States Code.

QUESTIONS PRESENTED

1. Did the Court of Appeals below err in holding that the personal books and records required to be kept by Petitioner under the Internal Revenue Laws fall outside the constitutional protection of the Fifth Amendment under the public records doctrine enunciated in *Shapiro* v. *United States*, 335 U.S. 1?

2. Did the District Court err in instructing the jury that the taxpayer had a right under the Fifth Amendment to the Constitution to refuse to surrender or allow inspection of his books and records by Revenue Agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution but that such failure to produce the books and records was a circumstance which the jury might consider in determining the issue of wilfully filing a false return?

3. Did the Government properly establish the taxpayer's net worth at the beginning of the taxable year in question sufficiently so as to present an issue which the jury should determine?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution

"No person * * * shall be compelled in any criminal case to be a witness against himself. * * *"

Internal Revenue Code

Sec. 145 PENALTIES

* * *

(b) Failure to collect and Pay Over Tax, or Attempt to Defeat or Evade Tax—any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction

thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the cost of prosecution (26 U.S.C. 1946 ed. Sec. 145).

Section 275 PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*

The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (26 USC 1946 ed. Sec. 275(a)).

Sec. 3614 EXAMINATION OF BOOKS AND WITNESSES.

(a) *To determine liability of taxpayer.*

The Commissioner for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons (26 USC 1946 ed. Sec. 3614(a)).

Sec. 3633. JURISDICTION OF DISTRICT COURTS.

(a) *To enforce summons.*

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data. (26 USC 1946 ed. Sec. 3633(a)).

STATEMENT OF THE CASE

Petitioner, Samuel R. Beard, was tried in the District Court of Baltimore before a jury upon two indictments charging him with wilfully attempting to evade his income taxes for the years 1944, 1946 and 1947 by filing false returns with the Collector of Internal Revenue in Baltimore, Maryland in violation of Section 145(b) of Internal Revenue Code. He was found guilty upon the charge covering the year 1944 and was acquitted of the charges covering the years 1946 and 1947. Prior to the trial a similar charge covering the year 1945 was dismissed as barred by limitations.

The charge of the indictment for the year 1944 was that Beard had filed a false return stating that his net income was $16,751.76 and the tax due was $5,555.88, whereas he knew his net income was $542,216.27 upon which he owed a tax of $483,563.30. The Government conceded that Beard's return correctly reported his net income from real estate and investments but contended that he had failed to report a large net income from gambling. Beard's position in reply was that the losses in his gambling operations had exceeded his gains in this year and therefore his return, prepared by a public accountant, made no mention of gambling operations.

This return, along with the returns for the years 1945, 1946 and 1947, was assigned to Revenue Agent Samuel W. Ford for examination and audit on November 21, 1947. After a preliminary analysis of Beard's bank accounts, Ford and his group chief requested the cooperation of the Intelligence Unit and Special Agent E. Russell Kennedy, Jr. was assigned to work with Agent Ford on the criminal aspects of the case.

Following a telephone request from Special Agent Kennedy, on April 6, 1948 Beard and his wife permitted the agents to inspect and inventory their safe deposit boxes. Beard's box contained the usual papers, $6,500.00 in United States bonds and $15,000.00 in cash.

The Agents then asked to look at Beard's gambling records. Beard stated that they were in the hands of the accountants whose names were revealed on his tax returns. Beard said he would get the books together and call Agent Kennedy in a few days.

About two weeks later, Beard's counsel told the Agents that he would be happy to supply all records if and when the criminal aspects of the case were disposed of, otherwise if the Agents wanted the records they could get them by summons or subpoena. The Revenue Agent saw fit not to secure the books and records by lawful process (A. 150). The reason for the Agent's action in this regard is given on page 681 of the Transcript of Testimony wherein Agent Kennedy testified that if the books and records were subpoenaed the information would not be admissible in trial against the Petitioner.

At the trial, the Government resorted to two methods of indirect proof of income which differed widely as to Beard's alleged net income and tax liability. Method Number 1, presented by Revenue Agent Ford, totaled as receipts all monies deposited in the bank accounts of Beard and his wife. For the year 1944 these amounted to $248,-198.01. To this total was added $717,384.50 representing the total of checks drawn by persons other than Beard or his wife on banks outside the District of Columbia which bore the signature of Beard or his wife as last endorser. Certain local checks discovered by the Agents were then added to make the grand total of receipts $975,238.81. From the total thus derived initially the Government eliminated certain known non-income items, duplications of receipts and gambling expenses totalling $331,713.01. As a result of evidence produced at the trial the Government made adjustments totalling $74,111.10 which resulted in an alleged adjusted net income of $534,135.65 upon which the tax was computed to be $460,220.86.

To identify the source of the receipts as gambling income the Government called eight witnesses who identified only 77 checks totalling $236,503.10 which bore Beard's

signature as last endorser and which had been cashed or deposited by him. Of this total $50,803.10 was identified as receipts from gambling. The Revenue Agents were unable to interview many of the makers or prior endorsers of checks bearing Beard's name as last endorser and therefore assumed that these checks were income to Beard unless he proved to the contrary. In cases where the Revenue Agents did interview the makers or prior endorsers and the maker or prior endorser was unable to say why the check was given to Beard the Revenue Agent treated those checks as income to Beard unless he could prove to the contrary. In opposition, through cross-examination of these and other witnesses gambling losses by Beard in the amount of $71,682.80 were shown.

Method Number 2, presented by Special Agent Kennedy, was based upon a net worth statement prepared by him. This method indicated a net taxable increase for the year 1944 of $89,804.86. Kennedy admitted that this amount required adjustment downward to the extent of $4,775.00 to cover Home Owners Loan Corporation bonds not included in the base year and sold by Beard in 1944. Further adjustment to eliminate certain checks totalling $38,732.87 which had been issued by Beard late in December 1944 but had not cleared the bank until January 1945 and thus were erroneously included in his year-end bank balance was indicated (A. 157). Without making the indicated adjustments the income tax due was computed to be $63,877.64.

Under Method Number 1, the Government contended that Beard had understated the tax due by him by $454,664.98, whereas under Method Number 2 the understatement was allegedly $58,321.76, without making the indicated adjustments.

Relying upon the failure of the Government to meet the burden of proof, Beard elected not to take the stand. The defense offered the testimony of two accounting experts, the Chairman of the Maryland Board of Examiners for Certified Public Accountants and a Professor of Accounting at the University of Maryland, who described Method Num-

ber 1 as an "accounting monstrosity" from the point of view of trying to arrive at Beard's net income. (A. 325) In addition the defects in Method Number 2—that the opening net worth did not credit Beard, a gambler on a large scale, with any cash on hand, and that there was no certainty that all Beard's assets and liabilities had been included—were pointed out (A. 326).

The trial court instructed the jury:

> "Also, I instruct you that the taxpayer who keeps records or books of account is required to produce them at a reasonable time for inspection by the duly authorized Government revenue agents in connection with their administrative duties in checking the correctness of the returns, and failure or refusal of the taxpayer to produce his books and records for such purpose is a circumstance which may be considered by you, the jury, in determining the issue of whether he has wilfully filed a false return.
>
> "In this connection, I instruct you that the taxpayer may exercise his constitutional right under the Fifth Amendment to the Constitution to refuse to surrender or allow inspection of his books and records by revenue agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution; and such constitutional priviledge against self-incrimination is not impaired by the rule that the Court has just stated, that the taxpayer's failure to produce any books and records that he may have, at a reasonable time for inspection by revenue agents, is a circumstance which may be considered by you, the jury, in determining the issue of wilfully filing a false return, in a criminal proceeding such as this" (A. 368).

Petitioner objected that this instruction, though correctly recognizing his constitutional right, completely nullified that right by stating that his exercise of the right was a circumstance which might be considered by the jury in determining the issue of wilfully filing a false return. The Court of Appeals found no error and held that under *Shapiro* v. *United States*, 335 U.S. 1, income tax records fall outside the constitutional protection of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

1. The Public Records Doctrine Enunciated in Shapiro v. United States Should Not be Extended so as to Apply to the Books and Records Required to be Kept by an Individual Under the Internal Revenue Laws.

The vital issue in this case is whether the provision of the Fifth Amendment to the Constitution, which provides that a person is not required to supply information which may incriminate him, applies to the personal books and records which an individual taxpayer is required to keep according to Internal Revenue laws. This is a question which concerns the millions of United States taxpayers who file personal income tax returns. This Court has never decided this specific issue.

In *Shapiro* v. *United States*, 335 U.S. 1, this Court decided that the records required to be kept by the Emergency Price Control Act are public records and, therefore, the constitutional privilege does not apply to those records. The Court of Appeals for the Fourth Circuit in the case below on page 19 of its Opinion has construed the Shapiro case to be applicable to the personal books and records of this Petitioner thereby depriving him of his constitutional rights not to furnish information which may incriminate him.

We submit that the Court of Appeals below was in error in extending the public records doctrine of the Shapiro case to the books and records required to be kept by an individual taxpayer.

Although the Shapiro case was decided by this Court in 1948, a number of lower Courts since that time have proceeded on the assumption that the personal records required to be kept by a taxpayer are the proper subject of the privilege against self-incrimination contained in the Fifth Amendment. These Courts were concerned only with the question of whether the taxpayer had waived his constitutional right when he gave his books and records to a Revenue Agent under the mistaken belief that the Revenue Agent was only concerned with the civil liability. In none

of the cases has the Government taken the position that the books and records were not privileged. The Government's position was that the privilege was waived when the taxpayer voluntarily gave the books and records to the Revenue Agent. All the parties concerned in these cases proceeded on the basis that the taxpayer had the constitutional right not to produce his books and records for inspection by Revenue Agents and the only dispute was whether the taxpayer had waived his right. *U. S.* v. *Guerrina*, 112 F. Supp. 126 (D.C. PA, 1953), reargued in 1955, 126 F. Supp. 609; *U. S.* v. *Wolrich*, 119 F. Supp. 538 (S.D. D.C. N. Y. 1954); *U. S.* v. *Lipshitz*, 117 F. Supp. 466 (E.D. D.C. N. Y. 1954); *Montgomery* v. *U. S.* 203 F. (2d) 887 (CA 5 1953).

The Internal Revenue Service proceeded on the basis that the books and records are privileged. Thus Special Agent Kennedy testified at the trial in the District Court as follows (Transcript of Testimony page 681):

> "Q. (By Mr. Black) Why didn't you subpoena the records, Mr. Kennedy?
>
> A. It is my belief personally, it is a matter of law, and it is the policy of the Internal Revenue Service, and it is contained in a directive in the manual of the Intelligence Unit, Internal Revenue Service, that you should never issue process to compel the production of records or the testimony of any individual against whom we contemplate the possibility of recommending criminal prosecution in the future; we would be forcing him to testify against himself and, therefore, anything we got from him would not be admissible against him.

The question as to whether the public records doctrine of the Shapiro case applies to personal books and records of individuals in income tax cases has been of great concern to lawyers in the field of taxation and has been the subject of numerous articles in tax publications. See Redlich—"Searches, Seizures, and Self-Incrimination in Tax Cases" Tax Law Review, Vol. 10, No. 2, page 191 (January, 1955); Doyle "Motion Practice in Fraud Cases",

New York University Institute on Federal Taxation, Vol. 13, page 936 (1955); Albert J. Gould "The Taxpayers Constitutional Privileges in Income Tax Investigations" Vol. XXXI of DICTA, Monthly Journal of The Denver Bar Association, The Colorado Bar Association, The University of Denver College of Law (September 1954); Murphy "The Privilege Against Self-Incrimination", New York University Institute on Federal Taxation, Vol. 11, page 745 (1953); Lipton "Safeguarding Constitutional Rights in Tax Fraud Investigation" 32 Taxes 263 (1954); Kamens and Ancier "Immunity from Subpoena of Taxpayers' Records" 27 Taxes 639 (July 1949).

The constitutional rights of all accused persons must be zealously guarded and a prosecution under the income tax law does not require the complete abrogation of the rights granted an accused under the Bill of Rights.

2. The Trial Court's Charge Permitting the Jury to Consider Petitioner's Exercise of His Constitutional Rights as a Circumstance Determining the Issue of His Guilt Was Erroneous and Deprived the Petitioner of the Full Use of the Rights Granted to Him by the Bill of Rights.

Petitioner objected to the following instruction by the Trial Court:

> "In this connection, I instruct you that the taxpayer may exercise his constitutional right under the Fifth Amendment to the Constitutional to refuse to surrender or allow inspection of his books and records by revenue agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution; and such constitutional privilege against self-incrimination is not impaired by the rule that the Court has just stated, that the taxpayer's failure to produce any books and records that he may have, at a reasonable time for inspection by revenue agents, is a circumstance which may be considered by you, the jury, in determining the issue of wilfully filing a false return, in a criminal proceeding such as this." (A. 368).

It is respectfully submitted that this instruction, while initially recognizing Petitioner's constitutional right, completely nullified the right by stating that the exercise of the right was a circumstance which might be considered by the jury in determining the issue of wilfully filing a false return.

This Court in *Boyd* v. *U. S.*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746, (1886) established the proposition that the compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himeslf, within the meaning of the Fifth Amendment to the Constitution, and is also the equivalent of an unreasonable search and seizure within the meaning of the Fourth Amendment. The Shapiro case did not overrule this case.

The rule of the Fifth Amendment that a defendant shall not be compelled in any criminal case to be a witness against himself equally forbids the drawing of any inferences from his non-production of privileged documents. *Wigmore on Evidence* (3 Ed.) Vol. 8, Sec. 2272, p. 419. The prohibition against commenting on or drawing inferences from the exercise of a Constitutional right is as vital as the recognition of the right itself. In *Johnson* v. *U. S.*, 318 U.S. 189, 196, 63 S. Ct. 549, 87 L. Ed. 704, this Court said:

> "* * * But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (Wilson v. United States, 149 U.S. 60, 37 L. Ed. 650, 13 S. Ct. 765) is then applicable. As stated by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allow-

ance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.' * * * We also think that the same result should obtain in any case where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial."

The Trial Court further charged the jury as follows:

"Also, I instruct you that the taxpayer who keeps records or books of account is required to produce them at a reasonable time for inspection by the duly authorized Government revenue agents in connection with their administrative duties in checking the correctness of the returns, and failure or refusal of the taxpayer to produce his books and records for such purpose is a circumstance which may be considered by you, the jury, in determining the issue of whether he has wilfully filed a false return. * * * (A. 368)

This instruction overlooked entirely that Petitioner's income tax return for the year 1944 was filed on March 15, 1945 and that production of records was not requested until April 6, 1948, more than three years after the filing of the return. By that time the limitation period for the assessment of additional income tax provided by *USC Title 26*, Section 275(a) had run. While the Internal Revenue Code (USC Title 26, sec. 3614(a) does not definitely limit the time within which books and records must be examined, the courts have applied the principle that an examination may not be made after the limitation on assessment has expired unless there is a showing made to the Court of some evidence of fraud. *Farmers & Mechanics Nat. Bank of Philadelphia* v. *U. S.*, 11 F. 2d 348; In Re *Andrews' Tax Liability* (D.C. Md.) 18 F. Supp. 804; *In Re Shapiro* (D.C. N.Y.) 39 F. Supp. 304.

It is clear from the foregoing cases that the Petitioner had an absolute right to refuse to permit the examination

of his books and records for the year 1944, which is the only year involved in this case, and the Trial Court's instruction was erroneous on the facts.

That the jury was confused by the inconsistent and contradictory parts of the instruction is evidenced by the fact that after it had deliberated for a number of hours the Foreman sent a note to the Judge asking if it was possible for the jury to have a copy of the Judge's charges pertaining to withholding records or books (A. 383). The trial judge had the jury brought into the courtroom and the challenged instruction was again given to the jury. The repetition of this erroneous instruction did not eliminate the confusion but merely accentuated its misleading character and obviously adversely affected the Petitioner in the jury's consideration of the vital issue in the case.

The error in the charge was not a harmless error. In *Ballenbach* v. *U. S.*, 326 U.S. 607, 66 S. Ct. 402, this Court stated:

> "But precisely because it was a 'last-minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue. * * * The influence of the trial judge on the jury is necessarily and properly of great weight and the jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading the error is not cured by a prior unexceptional and unilluminating abstract charge".

We submit that the Trial Court's charge to the jury in this respect was an infringement of the Petitioner's constitutional right and that it was so contradictory and confusing to the jury that it denied the Petitioner a fair trial. The Appellate Court below was in error in failing to find that the charge was erroneous and constituted a reversible error. The question of a proper charge to the jury in a criminal case is of sufficient importance that this Court should grant the Petition for a Writ of Certiorari as prayed for by the Petitioner.

3. The Government Failed to Prove a Proper Starting Point for the Net Worth. Therefore It Was an Error for the Trial Court to Submit the Net Worth Testimony to the Jury.

Under Method No. 1, Revenue Agent Ford claimed that Petitioner understated his income tax for 1944 by $454,-664.98.

Special Agent Kennedy using Method No. 2, the net worth, claims that Petitioner understated his tax by $58,-321.76. Thus we have two Government agents in great disagreement as to the alleged income of Petitioner. This enormous disparity is not reconcilable.

Special Agent Kennedy, who prepared the net worth statement, testified as follows:

> "I have no way of knowing that the defendant may not have had many more assets and many more liabilities for that matter" (A. 287).

Despite the fact that the Petitioner was a bookmaker and the testimony of Agent Ford that bookmakers needed cash to operate, Special Agent Kennedy in his net worth statement showed blank under the item "Cash on hand" at the beginning of the base year. Special Agent Kennedy's only proof of this item is contained in his testimony as follows:

> "Q. I note that they are blank, except for December 31, 1947, which is $15,000. Where did you get the figure?
> A. The $15,000 was found in Mr. Beard's safety deposit box when we inventoried it on April 6, 1948. At that time I asked Mr. Beard how long that money had been there, and he said he didn't know. I asked him if it had been there as of December 31, 1947, which is only three months and six days prior to the date of our conversation, and he said 'Yes', it had been there at that time. I asked him if that money, or any part of it, had been in his safety deposit box as of the end of the prior year, 1946, and he said he couldn't say that it had not been there that long ago. Therefore, I put it down for $15,000 cash on hand at the end of 1947, and none at the end of the prior years." (A 272-273).

There is no testimony in the entire record to support Special Agent Kennedy's starting point of "no cash on hand" as of December 31, 1943. The Government agents did not ask the Petitioner whether he had any cash on hand on December 31, 1943. The Government did not offer any testimony similar to that produced in other net worth cases to support its contention that the Petitioner had no cash on hand at the end of the base year. There was no evidence of the Petitioner's financial history which would negative the existence of cash on hand. Nor was there any evidence of Petitioner's tax returns for prior years. We respectfully submit that the evidence which the jury was permitted to consider in regard to the net worth part of this case was not sufficient upon which a verdict of guilty could be sustained. The failure of the Government to prove by some competent evidence the item of "no cash on hand" brings this case in conflict with the requirements of a proper starting point for net worth as set forth by this Court in *Holland* v. *U. S.* 348 U.S. 121 and *Friedberg* v. *U. S.*, 348 U.S. 142.

We submit that the District Court erred in permitting the evidence under the net worth method to go to the jury. The Appellate Court below erred in holding that the Trial Court's action was in harmony with the decisions of this Court in *Holland* v. *U. S.* and *Friedberg* v. *U. S.*

Whether the lower courts are properly following the markings laid down by this Court in net worth cases is of great importance. This Court should definitely decide whether the Government in a net worth case can start out with "no cash on hand" even though it has no evidence, not even the taxpayer's statement, to show whether or not there was cash on hand at the beginning of the base year.

CONCLUSION

For the reasons stated, the Petitioner asks that the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6902

SAMUEL R. BEARD, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the District of Maryland, at Baltimore. Criminal

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(Argued March 9, 1955 Decided April 15, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Thomas J. Kenney and Michael Gould (Joseph O. Kaiser on brief) for Appellant, and George Cochran Doub, United States Attorney, and Walter E. Black, Jr., Assistant United States Attorney, for Appellee.

SOPER, Circuit Judge:

After a lengthy trial in the District Court, Samuel R. Beard was convicted of violating Title 26§ 145(b) of the Internal Revenue Code under an indictment which charged that he wilfully and knowingly attempted to defeat and evade a large part of the federal income tax due by him for the year 1944 by filing a false and fraudulent return wherein he stated that his net income for the year was $16,751.76 and the tax thereon $5,555.88, whereas he knew that his

net income was actually $542,216.27 and the tax thereon $483,563.30. At the same time he was acquitted of similar charges in another indictment with respect to the years 1946 and 1947. Prosecution of similar charges as to 1945 was held to be barred by limitations. He was sentenced to serve a term of five years in prison and to pay a fine of $10,000. He appeals to this court on the grounds (1) that the trial court erred in admitting certain testimony; (2) that if this evidence had been excluded, the proof was legally insufficient to sustain the verdict of guilty; (3) that erroneous instructions were given to the jury, and (4) that the United States Attorney exceeded the proper bounds of advocacy in his closing argument to the detriment of the defendant.

The Government undertook to compute the taxable income of the defendant first by showing his receipts and disbursements and second by showing his net worth in each of the years covered by the indictments. The evidence offered by the Government tending to sustain the charge with reference to the year 1944 may be summarized as follows: Beard was a resident of Washington, D. C. On March 15, 1945 he filed a joint income tax return with his wife for the year 1944 with the Collector of Internal Revenue in Baltimore. This return disclosed a gross income of $17,337.07 consisting of $5,005.43 in dividends and interest, $3,754.30 in rents and $8,577.34 from the business of the Lincoln Athletic Club in which Beard was a partner; and it showed a net income of $16,751.56 on which a tax of $5,555.58 was paid. The return was based on records maintained on behalf of the taxpayer relating to legitimate transactions on his part, and it is conceded by the Government that these records were substantially correct and that the taxpayer correctly reported his income from these sources.

The tax return for 1944 contained no information as to income from any other business under the caption "profit or loss from business or profession." In other words the return disclosed no income from any source other than those above mentioned. It was shown, however, by extensive undisputed testimony that during the year 1944 and subsequent years Beard conducted a gambling business on a vast scale as a bookmaker, dealing directly with the betting

public, and also as a "lay-off" man for other bookmakers who placed "hedging" bets with him. For this purpose he maintained establishments at 307 9th Street, N. W., Washington, D. C., and 3701 Bladensburg Road, Colmar Manor, Maryland, and another at 3603 38th Street, Colmar Manor, Maryland, which he used in case of interference by the police. The Bladensburg Road location was equipped with a battery of telephones and Western Union ticker service for prompt racing returns and other purposes of the business.

The revenue agents who investigated the case repeatedly requested Beard to produce the records of his gambling operations. At first he agreed to do so but later, on the advice of counsel, he refused to furnish them while the criminal aspect of the charges was pending. Nevertheless the Government agents were able to show that Beard deposited large sums of money in joint bank accounts in the name of himself and his wife in the Bank of Commerce and Savings in Washington, D. C. Therein he separately maintained an investment account, a commercial account and two savings accounts, as well as two safe deposit boxes. The deposits in the investment account in 1944 amounted to $26,308.54 and the deposits and withdrawals in this account were consistent with the figures on his tax return. The deposits in 1944 in the commercial account amounted to $203,225.44 consisting of $44,149.44 in checks, $150,773.45 in currency and $8,302.55 in coin. The deposits in this account, 85 in number in 1944, were made continuously throughout the year. The total deposits were more than ten times the gross income reported in his tax return for this year.* The Government agents were unable to identify withdrawals from this account since they did not have access to the returned checks of the defendant. In addition to the deposits in the investment account and the commercial account, $15,377.70 were deposited in Beard's savings account and $3,231.75 in his wife's savings account.

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* In 1945 deposits in this account exceeded $62,000; in 1946, $153,000; and in 1947, $102,000, in each case far in excess of his reported income for the year.

Strong light was thrown on the source of the deposits in Beard's commercial account by an investigation of the amount of the out-of-town checks and money orders received by him which he deposited or cashed at the Bank of Commerce and Savings. This bank cleared through the Lincoln National Bank in Washington. The microfilm records of the latter bank for the years 1944 to 1947, representing hundreds of thousands of items, were meticulously examined by the Government agents, and the items originating with Beard were tabulated. The examination showed that during 1944 Beard received 854 checks and money orders drawn on out-of-state banks, and 1746 such items during the four year period. They were drawn on 250 different banks in 150 cities in 36 states, including New Hampshire, New York, Pennsylvania, Florida, Louisiana, Texas, Illinois, Ohio, Montana, Nebraska, Nevada and California. The money orders were drawn in 19 cities located in 12 states. The last endorser on all of these checks was the defendant Beard. The agents prepared a tabulation of each one of the items showing the name of the bank, the drawer, the payee and the amount; and the tabulations were submitted to the defendant's attorneys two years before the trial. The Beard items on the microfilm were photographed and were made available to the defendant's attorneys long before the trial. The microfilms were retained in the bank but they were produced in court at the time of the trial.

All of the checks and money orders were either deposited or cashed at the National Bank of Commerce. They amounted in 1944 to $717,384.50, in 1945 to $169,849.80, in 1946 to $217,610.83 and in 1947 to $109,504.71.

In addition to the large number of out-of-town checks and money orders cashed or deposited at the Bank of Commerce, it was shown that Beard handled large sums of cash and local checks during 1944 and subsequent years. It was his custom to bring or send to the Bank of Commerce two or three days each week checks, currency and coins, the latter in a canvas bag, and to exchange the proceeds for $100 bills or other bills of large denomination. The sum total of these transactions for the entire year 1944 was not shown because no record of such items was

kept by the Bank until June 15, 1945 when records were set up under Treasury Regulations with respect to abnormal currency transactions. These transactions amounted to $443,593.69 for the period from June 15 to December 31, 1945, $925,379.84 for the year 1946, and $408,611.35 for the year 1947, or a total of $1,777,584.88 for the two and a half year period.

A summary taken from the records of the Bank of Commerce and Savings shows that during the year 1944 Beard received the sum of $975,238.81, which included deposits in the investment account, $26,308.54, commercial account $203,225.44, savings account $15,377.70, Building Association $50.35, Mrs. Beard's savings account $3,235.98, out-of-town clearances $717,384.50, local checks $9,656.30. This total does not include the currency transactions in this year, of which there are no records, in which Beard exchanged checks and currency for bills of large denomination.

It was obvious to the Government agents that the sums of money which passed through the defendant's hands in 1944 did not fairly represent his net income; and therefore they undertook an exhaustive search to ascertain what deductions should be made for possible duplications, business expenses and amounts not attributable to the defendant's gambling operations. For this purpose the agents took the following steps: after first obtaining his known expenses from the records of Frank Owings, an investment counsellor of the defendant, the agents analyzed and investigated Beard's investments and out-of-town clearances to determine what, if any, duplication there might be between the two, and further to find, as well as they could without access to Beard's gambling records and books, what portion of the funds which passed through his hands constituted taxable income.

Having found for the four years a total of 1746 out-of-town clearance items on the microfilm of the Lincoln National Bank, upon which Beard was the last endorser, the Government agents attempted to locate all the drawers, endorsers and remitters thereof and was successful as to 1200 of them, some of whom appeared on more than one

item and for large amounts. By virtue of this search out-of-town items in the sum of $247,100.07 were eliminated from the total for the year 1944 because the remitters claimed that the checks were cashed by Beard for their accommodation, and the agents accepted their statements.

The agents also strove to eliminate duplications. It was the custom at the Bank of Commerce and Savings for the teller to place a stamp on checks which were cashed but not on checks which were deposited. Guided by this circumstance the Government eliminated the deposits from the total of out-of-town clearances since it was obvious that they had already been included as deposits in one of Beard's accounts at the bank. In addition, in order to eliminate possible duplications, a comparison was made of the dates of all the checks which had been cashed with the dates of currency deposits. Where, in any instance, the two coincided, it was assumed that the proceeds of the check had been deposited and the amount of the check was deducted to the extent it was represented by a deposit on the same day. Additional deductions were made for business expenses and gambling losses when they could be ascertained.

As the result of the information revealed by their searches, the agents made the following deductions: (1) deposits in the defendant's investment account in the bank comprising the sum of $16,436.34 which represented monies received by Beard in payment of loans by him, and $4775 from the proceeds of bonds sold during the year; (2) a deposit of $532 in the bank account of the defendant's wife; (3) out-of-town items in the amount of $26,809 deposited in Beard's commercial account; (4) $32,936.09 representing a possible duplication of the amount of out-of-town checks cashed by the defendant and money deposited in the defendant's commercial account; (5) the sum of $3,123.41 in out-of-town items found to be a payment of loans made by Beard; (6) the sum of $247,100.07 of out-of-town items which, according to statements made by the drawers to the agent, represented checks cashed by Beard for their accommodation; (7) deductions for business expenses for wire service rental, bad checks and gambling losses in the sum of $35,279.05. The aggregate of these

items reduced the amount of the income chargeable to Beard to the sum of $608,246.75.

This amount was further reduced as the result of developments during the trial. The Government produced a number of witnesses who had given out-of-town checks in varying amounts to Beard in payment of gambling losses. On cross examination some of these witnesses testified that on occasion they had won bets with Beard and they identified certain of his checks in payment, which his attorneys produced. These items were accordingly deducted and together with other corrections, reduced the unreported income of Beard in 1944 to the sum of $517,383.89. From this amount an exemption of $1,000 was deducted and after making allowance for the sum of $5555.88 previously paid by Beard as the tax of the year, a deficiency of $454,-664.98 was ascertained.

Net Worth Method.

The Government, however, in proving its case did not rely entirely upon the calculation which showed the monies passing through Beard's hands in the course of his gambling business, and the deductions and eliminations therefrom which the revenue agents were able to find. There was also an earnest effort to ascertain the financial status and taxable income of the defendant by comparing his net worth at the beginning and at the end of each of the years covered by the indictments. The computation was made by Samuel W. Ford, a revenue agent of the Treasury Department with twenty years' experience, and E. Russell Kennedy, a special agent of the Internal Revenue service for 27 years. In making their investigations the agents checked the land records of the District of Columbia and the nearby counties in Maryland and Virginia, visited over 80 banks and checked motor vehicle registries and automobile dealers' records. They also examined the records of the investment counsellor of Beard, and made contact with numerous persons who had had transactions with the defendant. The purpose was to ascertain the defendant's assets consisting of real estate, stocks, bonds, bank accounts, currency, & c., and also his liabilities such as mortgage liens, obligations to banks and brokers, personal loans and debts.

The computation as to 1944, except as to depreciation, was based on evidence taken at the trial. It showed assets at the end of 1943 of $289,754.57, consisting of cash in bank, loans receivable, war savings bonds, automobiles, real estate, furniture and fixtures in a hotel and a partnership interest in a barber shop; and liabilities of $45,260.77 consisting of deeds of trust or mortgages on real estate and depreciation on buildings, furniture and fixtures, or a net worth of $244,493.80. The corresponding figures at the end of 1944 showed assets of $365,543.36 and liabilities of $43,485.91, or a net worth of $325,057.45. Thus the increase in net worth during the year was $80,563.65, to which was added income taxes of $9,241.21 paid during the year, making a total increase in net worth in the sum of $89,804.86 for the year 1944. The money spent for living expenses during the year, usually added in a net worth statement, was not taken into consideration since the figures were not available. The computation also showed a progressive increase in net worth for the succeeding years, that is, $58,723.42 in 1945, $61,355.17 in 1946 and $132,188.50 in 1947.

The sources from which the figures were taken were explained. The assets were ascertained from the ledgers and records of the bank, an investment counsellor of the defendant, borrows from the defendant, the contents of a safe deposit box shown to the agents by the defendant, the land records and the records of automobile dealers. The liabilities were obtained from the records of the mortgages and depreciation was calculated at a definite percentage per annum based on cost.

The position of the defendant in respect to the net worth method is that the evidence was so uncertain as to have no probative force to show tax evasion, and therefore the computation was inadmissible in evidence. It is said that the agents did not etsablish a starting point with reasonable certainty and in fact had no way of knowing the exact amount of the assets and liabilities of the defendant either at the beginning or end of the year. In this respect, however, the quality of the proof offered by the Government did not differ materially from that usually employed in criminal prosecutions when the Government is forced to estimate the

net worth of the defendant because he has failed to keep or refuses to produce records of his business. It has been recognized in gambling cases and in other cases of tax evasion that it is impossible for the Government to prove the exact amounts of unreported income, and that to require precision in computing the profits from an elaborately concealed business would be tantamount to holding that skillful concealment is an immovable barrier to proof. See *United States* v. *Johnson*, 319 U.S. 503, 517, 518.

The evidence outlined above clearly shows that the Government agents did make a diligent search to ascertain the assets and liabilities of the defendant. The specific criticism of the defendant is directed to three points. (1) There was a failure to include in the assets at the beginning of the year $4775 of Home Owners Loan Corporation bonds which were sold during the year. This omission was pointed out by the agent himself in direct examination and, when taken into consideration, did not materially affect the probative force of the evidence. (2) The calculation does not make any allowance for cash on hand at the end of December 31, 1943 notwithstanding abundant evidence that the defendant was handling a large sum of money in the course of his gambling business. The amount of cash on hand, other than cash in bank, at the beginning and end of the year was not known to the agents, and therefore could not be considered; but there was nothing to show that the amount of cash on hand was greater at one end of the year than the other. The contention of the defendant in this respect therefore loses significance. The case is unlike that discussed in *Holland* v. *United States*, 348 U.S. 121, and *Friedberg* v. *United States*, 348 U.S. 142, in which the taxpayer presented evidence of substantial cash on hand which was not allowed in the net worth statement of the Government. Even in those cases a conviction was sustained by reason of other aspects of the Government's proof. (3) During the cross examination of the Government agents defendant's attorneys produced checks of the defendant in the sum of $38,732.87 which were issued in December, 1944 but were outstanding and not included in the liabilities of the defendant as of the end of the year. The existence of these checks was not known to the agents until they were produced by attorneys for the defendant during the trial; but if they had been

previously known it would not have been proper to have taken them into consideration, unless the amount of outstanding checks at the end of the previous year had also been known. Nothing in the evidence indicates that the amount of outstanding checks was materially different at the end of one year than at the end of the other, and if they had been taken into account only at the end of 1944, the computation would obviously have been distorted and incorrect. The untenable position of the defendant is clearly shown by his offering in evidence only the checks at the end of the year and his withholding of the amount of outstanding checks at the beginning of the year. The defendant's attorneys had access to his records and their failure to produce those which would have made possible an exact calculation on the particular point, justifies the inference that their production would not have been to the defendant's interest.

The evidence elicited by the two methods of proof used by the agents was in our opinion sufficient to go to the jury as tending to prove the charges in the indictment. Obviously and necessarily the computations were inexact in the accounting sense, as is shown by the striking difference between the results reached in the two calculations. It was clearly shown, however, that the agents made diligent efforts to ascertain the true facts and to run down every lead revealed by their searches and to give to the defendant the benefit of any circumstance favorable to his side of the case. It is quite likely that the expenses of the illegal business were far greater than those which the agents were able to find, but in view of the large sums of money received from all parts of the country which passed through the hands of a professional gambler of long experience over a considerable period of time, it is reasonable to conclude that the enterprise was not unprofitable.

The defendant relies on the testimony of eight Government witnesses as to their gambling transactions with him which allegedly resulted in winnings of $50,803.10 and losses of $71,682 in 1944. His attorneys state in their brief that because of this state of the proof the defendant elected not to take the stand and offered the testimony of two accountants whose testimony was confined to the cri-

ticism of the accounting methods used by the agents. The eight witnesses, however, constituted a very small proportion of the persons dealing with the defendant and the attorneys did not venture to explain why they produced from the defendant's custody only those items which tended to support the defense and withheld other items which would have shown the true nature and extent of the business.

The significance of deposits constantly made in the course of a lucrative business as indicating taxable income is pointed out in *Gleckman* v. *United States*, 8 Cir., 80 F. 2d 394, 399; and the impossibility in a case of this kind of presenting exact proof of the receipts and disbursements and the permissible inferences to be drawn from the operation of an illicit business are pointed out in the following quotation from the decision of the Supreme Court in *United States* v. *Johnson*, 319 U.S. 503, 517, in which the conviction of tax evasion by a gambler on a magnificent scale was sustained. The court said:

> "*** That these gambling transactions were on an enormous scale was overwhelmingly established. It is not to be expected that the actual financial transactions of such a vast illicit business would appear by direct proof. *** The long duration of this gambling business, the substantial evidence of the operation of the law of probability in favor of the houses, such records as there were pertaining to the private banking facilities and currency exchanges which were at the service of these houses, made it not a matter of tenuous speculation but of solid proof that there were winnings of a substantial amount which Johnson did not report."

Admissibility of Evidence.

The first objection of the defendant to the admissibility of evidence relates to the transcript of the Beard checks taken from the microfilm of the Lincoln National Bank. The evidence was offered in the following manner: Microfilm copies of the checks made by the Bank by the Recordak process in the usual course of business were brought into the courtroom in four large boxes, and having been identified, remained in the courtroom throughout the trial. They

comprised 950 reels of microfilm, each containing reproductions in miniature of approximately 1500 checks. From the microfilm the Government made enlarged photographs of 854 checks cashed or deposited in 1944 at the Bank of Commerce and Savings by Beard or his wife, and bearing the signature of one or the other as last endorser. These items were listed on a 19 page document which contained as to each check the date, the bank on which it was drawn, the drawer, the payee and the amount; and it also contained figures by which it could be identified as one of the items in the microfilm. It was prepared by ten revenue agents under the supervision of agent Samuel W. Ford.

The defendant contends that it was error on the part of the court to allow the transcript of the checks to be introduced in evidence on the grounds (1) that the reels themselves were not in evidence, (2) that the enlarged photographs of the 854 checks selected should have been first produced and (3) that the 19 page transcript was not properly identified by the persons who prepared it.

It is obvious that the microfilm itself was to all intents and purposes offered in evidence since it was present in the courtroom and marked as an exhibit, and it is equally clear that it was admissible in evidence as a record kept by the bank in the due course of business under the provisions of 28 U.S.C. § 695 which were declared to be competent evidence in the case of *United States* v. *Manton*, 2 Cir., 107 F. 2d 834.

The nature of the objection that the enlarged photographs of the checks were not first produced is not clearly shown and it does not appear that the failure of the ten agents who prepared the transcript from the microfilm to testify was in any way prejudicial to the defendant. It would of course have been impossible for the court and jury to have personally examined the million and more items contained in the microfilm, and to select those pertinent to the case. The only practical course was to permit the results of the investigation to be presented to the jury subject to the examination and verification by attorneys for the defendant. It was shown that the transcript had been furnished to the defendant three years before the trial and the photographic copies of the checks two years before, so that he had ample

opportunity for inspection and comparison. The accuracy of the transcript was demonstrated by the fact that photographic copies of checks were produced from time to time during the course of the trial and in no instance was it discovered that there was any variation between them and the information contained in the transcript.

It is true that the agent in charge of the investigation, who appeared as a witness in the case, did not personally compare each item on the transcript with the photographic copy of the corresponding check, but the work of preparing the transcript was made under his supervision and the ten men who did the actual work were available as witnesses. It was indicated by the judge that they would be produced if the attorneys for the defendant desired to interrogate them. It is obvious that the evidence was relevant and that the defendant was in no way prejudiced by the manner in which it was produced.*

The defendant objected also to the ruling of the court admitting the testimony of three employees of a telephone company who gave a detailed description of the telephone equipment which they found at his various bookmaking establishments in March and May, 1945. The contention is that since the defendant was not on trial as to the year 1945, the evidence was inadmissible to sustain the charges contained in the indictments. The contention is hardly worth consideration since it was conceded during the trial that the

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* During the trial in the District Court the defendant moved that all of the evidence of bank deposits be stricken because the bill of particulars did not specifically state that they would be considered in the course of the trial. The motion was properly overruled. The bill of particulars stated that the internal revenue agents examined the records of the Bank of Commerce and Savings in order to determine the unreported income of the defendant and found that he had control of various deposit accounts therein. The defendant excepted to the bill of particulars and asked for a complete list of all of his checks that were not deposited and was furnished with a complete list of all of the out-of-town items. Hence he was fully informed that his bank accounts would be used in the course of the trial and there was no element of surprise when his deposits were put in evidence. He was of course better acquainted with the details of his transactions with the bank than the agents who had prepared the case for trial. See *Berger* v. *United States*, 295 U.S. 78, 82. *Land* v. *United States*, 4 Cir., 177 F. 2d 346.

defendant was engaged in gambling operations throughout the period from 1944 to 1947, inclusive. The evidence was relevant as showing the nature and extent of the operations, and even as to the year 1944 it was relevant on the question of the defendant's intent since it showed his conduct at a time not far distant from the period covered by the illegal operations for which he was indicted. Certainly it was not prejudicial to show that the defendant was in possession of facilities useful in the business in which it was admitted that he was engaged. *Emmich* v. *United States,* 6 Cir., 298 F. 5.

Instructions of the Court

Objection was made to an instruction of the trial judge that the jury in determining the issue as to whether the defendant had wilfully filed a false return might take into consideration his failure or refusal to produce his books and records for inspection when requested to do so by the Government agents charged with the duty of checking the accuracy of the returns, as provided by 26 U.S.C.A. § 3614. The instruction was in the following words:

> "Also, I instruct you that the taxpayer who keeps records of books of account is required to produce them at a reasonable time for inspection by the duly authorized Government revenue agents in connection with their administrative duties in checking the correctness of the returns, and failure or refusal of the taxpayer to produce his books and records for such purpose is a circumstance which may be considered by you, the jury, in determining the issue of whether he has wilfully filed a false return.
>
> "In this connection, I instruct you that the taxpayer may exercise his constitutional right under the Fifth Amendment to the Constitution to refuse to surrender or allow inspection of his books and records by revenue agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution; and such constitutional privilege against self incrimination is not impaired by the rule that the court has just

stated, that the taxpayer's failure to produce any books and records that he may have, at a reasonable time for inspection by revenue agents, is a circumstance which may be considered by you, the jury, in determining the issue of wilfully filing a false return, in a criminal proceeding such as this."

It is urged that this instruction was erroneous because the production of the taxpayer's records was not requested until April 6, 1948, more than three years after the 1944 return was made, by which time the assessment of an additional tax was barred by limitations under 26 U.S.C.A. § 275(a). It is conceded, however, that under §§ 3615 and 3633 of Title 26, the District Court has power to compel the production of records even as to barred years, if the court finds basis for a suspicion of fraud; but since the agents did not apply for an order under that statute, it is said that the defendant's refusal does not justify an inference of wrongdoing. Particularly it is urged that to permit an inference of guilt to be drawn from the failure of the defendant to produce records which might incriminate him, would violate the provision of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself.

We find no error in the instruction. For the purposes of this case it is immaterial that the revenue agents did not apply to the court for an order compelling the production of the records. Request was made of the defendant and refused, and the natural and proper inference to be drawn from the refusal, unless the defendant's constitutional rights are thereby infringed, is that the records disclose improper conduct on his part. A similar instruction in substantially the same form was sustained in *Myres* v. *United States,* 8 Cir., 174 F. 2d 329, and in *Olson* v. *United States,* 8 Cir., 191 F. 2d 985. Moreover, the instruction related to the duty imposed by the taxing statutes upon the defendant to keep records of his transactions so that the exent of his liability to income tax might be ascertained; and therefore the case falls within the rule laid down in *Shapiro* v. *United States,* 335 U.S. 1, which reviewed a conviction of violating the regulations under the Emergency Price Control Act and

held that it was proper for the jury, in determining the issue of the defendant's guilt, to consider the business records of the defendant produced by him under a subpoena issued by authority of the statute. It was held that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs relating to the public interest become public records in the sense that they fall outside the constitutional protection of the Fifth Amendment. The court said: (335 U.S. 32-3)

> "It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. It is not questioned here that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power. Accordingly, the principle enunciated in the Wilson case (*Wilson* v. *United States*, 221 U.S. 361) and reaffirmed as recently as the Davis case, (*Davis* v. *United States*, 328 U.S. 582) is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' "

The defendant also contends that it was error for the judge in the course of his charge to tell the jury that in

arriving at their verdict they might consider the failure of the defendant to offer an explanation of the discrepancy between his tax returns and his income, as indicated by the Government's proof. The court said:

> "Members of the jury, having explained that there are several common methods, and having explained generally, in outline, the two methods that the Government has seen fit to employ here, I instruct you that under any such method, you, the jury, may find that the taxpayer has been guilty of fraud, wilfully committed for the purpose of evading the full amount of tax that he owes, if, and only if, you shall find that, beyond a reasonable doubt, there has been no evidence presented or an adequate explanation of the discrepancies.
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> * * * * * *
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> "It is true that the burden of proof resting upon the Government does not shift, as the Court has explained, during the progress of the case. But when, as here, in trial on charges of income tax evasion, discrepancies are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you, the jury in arriving at your verdict. It is not incumbent upon the Government to adduce positive evidence to support a negative averment—the truth of which is fairly indicated by established circumstances—if you should find that to be true,—and which, if untrue, could be readily disproved by the production of documents or other evidence, probably within the defendant's possession or control."

This instruction was part of a charge in which the jury was repeatedly told in unmistakable language that the burden of proving the guilt of the accused as to each of the charges in the indictments rested upon the Government throughout the trial, and that the proof must be sufficient to convince the jury of the defendant's guilt beyond a reasonable doubt; and that the defendant had a constitutional right not to take the stand and that his failure to do so did

not weaken the presumption of innocence which persisted throughout the trial.

We find no error in the challenged portion of the charge given in this setting. It was in accord with the decisions of this and other courts. See *Bell* v. *United States*, 4 Cir., 185 F. 2d 302, 309; *Jelaza* v. *United States*, 4 Cir., 179 F. 2d 202; *United States* v. *Hornstein*, 7 Cir., 176 F. 2d 217; *Bradford* v. *United States*, 5 Cir., 130 F. 2d 630. Even in *Olender* v. *United States*, 9 Cir., 210 F. 2d 795, where such an instruction was criticized as tending to divert the attention of the jury from the duty of the prosecution to prove its case beyond a reasonable doubt, the court said (p. 509) that the challenged instruction, considered as a part of the whole charge would not in itself have required a reversal if other errors had not been committed during the course of the trial. As far back as *Yee Hem* v. *United States*, 268 U.S. 178, it was held that the compulsory self-incriminating clause of the Fifth Amendment was not violated by a statute which provided that the possession of illegally imported opium should be deemed sufficient evidence of guilt, unless the defendant should explain the possession to the satisfaction of the jury. In *United States* v. *Sullivan*, 274 U.S. 259, it was held that the Fifth Amendment does not protect the recipient of illicit income from prosecution for wilful failure to make an income tax return; and in the very recent case of *Holland* v. *United States*, 348 U.S. 121, 138, it was said that "once the Government has established its case the defendant remains quiet at his peril." This observation is especially pertinent in this case where the defendant, although availing himself of his undoubted right to remain silent nevertheless put in evidence fragmentary portions of the records of his business, admittedly in his possession, but nevertheless withheld the writings which would have given a complete picture of his gambling operations.

Finally it is contended that the United States Attorney exceeded the proper bounds of advocacy in his closing argument by appealing to the prejudices of the jury and urging them to base their determination on irrelevant factors. Specific objection is made to statements to the effect that the

defendant had operated one of the biggest gambling rackets in the country for four years, that he had refused to prove the records of his business which would doubtless have shown the payment of protection money, and that if the Government were compelled to perform the impossible task of proving defendant's expenses in order to secure a conviction, not a single professional gambler in the United States would ever pay an income tax. It is argued that it was prejudicial error for the United States to bear down on the "extraneous circumstance" that the defendant was violating the gambling laws, and to assert in the absence of proof that his expenses must have consisted largely in bribing the police. We do not consider that the remarks complained of went beyond the bounds of permissible argument, or that they were prejudicial to the defendant, especially as the trial judge fairly charged the jury and directed their attention to the specific findings which they must make in order to justify a conviction. It is manifest that the jury were not diverted from their duty to consider the evidence in all its bearings, since they found the defendant guilty only as to the year 1944 and acquitted him of violating the statute with reference to the years 1946 and 1947.

The judgment of the District Court is

Affirmed.

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OCTOBER TERM, 1955

No. 73

SAMUEL R. BEARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. 1a–19a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction of the petitioner was entered on April 15, 1955 (II R. 32). The petition for a writ of certiorari was filed on May 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury that it could consider as bearing on "wilfulness" petitioner's refusal to submit his records for use in the audit of his tax returns, where such refusal was not based on a claim of privilege against self-incrimination.

2. Whether the Government's corroborative net worth proof was properly submitted to the jury.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 54. RECORDS AND SPECIAL RETURNS.
>
> (a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.
>
> * * * * *
>
> (26 U. S. C. 1952 ed. 54.)
>
> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who will-

fully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the cost of prosecution.

* * * * *

(26 U. S. C. 1952 ed. 145.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.54–1 [as amended by T. D. 5381, 1944 Cum. Bull. 188]. *Records and Income Tax Forms.*—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. * * * The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may

become material in the administration of any internal-revenue law.

* * * * *

STATEMENT

Petitioner was indicted for violation of Section 145 (b), Internal Revenue Code of 1939, relating to his income tax liabilities for the year 1944 (I R. 4). A one-count indictment charged that he wilfully attempted to defeat and evade a large part of the Federal income tax due from him for the year 1944 by filing a false and fraudulent return stating that his net income was $16,751.76 and his tax thereon was $5,555.88, when, as he knew, his net income was actually $542,216.27 and the tax owing was $483,563.30 (I R. 4). Petitioner was convicted on this count after a jury trial.[1] He was sentenced to imprisonment for five years and a fine of $10,000 (I R. 3).

On March 15, 1945, petitioner filed his return with the Collector of Internal Revenue at Baltimore, Maryland, reporting only income from dividends and interest, from rents and from a partnership, the Liberty Athletic Club (I R. 23–24). The falsity of this return was established by three different lines of proof, the sufficiency of the first two of which are not here challenged.

[1] The first count of a second indictment covering a similar charge for the year 1945 was dismissed because it was barred by the statute of limitations. Petitioner was acquitted of a second and third count of the second indictment relating to the years 1946 and 1947 (Pet. App. 2a).

1. There was undisputed (I R. 183) testimony that, during 1944 and in succeeding years, petitioner "conducted a gambling business on a vast scale as a bookmaker" from three locations, one in Washington, D. C., and two in Colmar Manor, Maryland (Pet. App. 2a; I R. 57, 58, 139–140, 145, 148, 166–224). Yet no intimation of such a business, of a loss or profit from it, was reflected on his 1944 tax return (I R. 23–24).

2. Because petitioner, on advice of counsel, refused the repeated requests of the investigating agents that he produce the records of his gambling operations (I R. 18–22, 56), resort was had to circumstantial evidence to measure the scope of the income from that source. A thorough and exhaustive investigation was made of petitioner's banking activities (I R. 61–62), and, after analysis, a computation of his receipts and disbursements was made using the total of the regular periodic bank deposits in checks and currency together with the total of out-of-town checks and money orders cashed to yield a sum of $975,238.81 as the measure of petitioner's receipts in 1944 (I R. 345). Although petitioner was shown to have made it a practice to exchange large amounts of small checks and coins at his bank for bills of large denomination, the amounts involved in these transactions could not be determined for lack of bank records and hence these exchange transactions are not included in the total receipts figure (Pet. App. 5a). From the gross figure of $975,-

238.81, the following deductions as summarized by the court below were made to eliminate all discoverable non-income items such as loans, redeposits and exchanges and to credit petitioner with deductible expenses (Pet. App. 6a):

> * * * (1) deposits in the defendant's investment account in the bank comprising the sum of $16,436.34 which represented monies received by Beard in payment of loans by him, and $4,775 from the proceeds of bonds sold during the year; (2) a deposit of $532 in the bank account of the defendant's wife; (3) out-of-town items in the amount of $26,809 deposited in Beard's commercial account; (4) $32,936.09 representing a possible duplication of the amount of out-of-town checks cashed by the defendant and money deposited in the defendant's commercial account; (5) the sum of $3,123.41 in out-of-town items found to be a payment of loans made by Beard; (6) the sum of $247,100.07 of out-of-town items which according to statements made by the drawers to the agent, represented checks cashed by Beard for their accommodation; (7) deductions for business expenses for wire service rental, bad checks and gambling losses in the sum of $35,279.05.

This left a balance of $608,246.75, from which there was subtracted the amount of petitioner's gambling losses developed at the trial on cross-examination of some of the Government's wit-

nesses to petitioner's gambling winnings (I R. 332–337, 351). There remained as unreported income the sum of $517,383.89. The tax owing on this amount, after allowance of a thousand dollars exemption and the $5,555.88 previously reported as tax, was $454,664.98. (I R. 351.)

3. Net worth evidence was adduced as the third line of proof. Because of petitioner's refusal to supply information, two revenue agents searched the land records of the District of Columbia and neighboring counties of Maryland and Virginia, canvassed more than 80 banks (I R. 61), checked public automobile records and dealers' records, examined the records of petitioner's investment counsellor, and contacted the private individuals who had dealt with petitioner (I R. 266–278). This exhaustive investigation showed that at the end of 1943 petitioner had assets consisting of cash in the bank, loans receivable, war bonds, automobiles, real estate, furniture and fixtures in a hotel, and a partnership in a barbershop, having a total value of $289,754.57 (I R. 278). Trust deed and mortgage liabilities were found which, together with depreciation on buildings, furniture and fixtures, amounted to $45,260.77, so that petitioner's beginning net worth was shown to be $244,493.80 (I R. 349). At the end of the year 1944, the total of assets was $368,543.36 (I R. 279, 348–349), liabilities were $43,485.91 (I R. 349), yielding a net worth of $325,057.45 (I R. 349), an increase of $80,563.65 (I R. 283, 349), to which

was added the only known expenditure of $9,241.21 for income taxes paid in 1944[2] (I R. 349).

One item consisting of $4,775 of Home Owners Loan Corporation bonds on hand at the beginning of the year and sold during the years was admittedly overlooked during the investigation (I R. 288). The amount of cash on hand at the beginning or end of the year was not known (I R. 272–273). No "lead" was offered by petitioner during the investigation or by way of evidence at the trial that the cash on hand asset varied in any way to affect the net worth increase at year end (I R. 273).

Petitioner's refusal to submit for examination the accounting records of his gambling activities, which, as already noted, deflected the course of proof of his income from direct to circumstantial evidence, was touched on in the charge to the jury. The trial court instructed the jury that a taxpayer is required to produce his books of account for inspection by duly authorized revenue agents checking the correctness of returns, and that a taxpayer's failure or refusal to produce such records "is a circumstance which may be considered * * * in determining the issue of whether he has wilfully filed a false return." (I R. 368.) The court went on to state that a taxpayer might under the Fifth Amendment to

[2] For 1945, 1946 and 1947, increases, respectively, of $58,723.42, $61,355.17, and $132,188.50 were shown (Pet. App. 8a).

the Constitution refuse to surrender or allow inspection of his books on the ground that to do so might incriminate him, and that this privilege is not impaired by the rule that a refusal is a circumstance which might be considered by the jury in determining the issue of wilfulness (I R. 368).

ARGUMENT

1. In *Shapiro* v. *United States,* 335 U. S. 1, this Court held that sales records which were required to be kept under the Emergency Price Control Act were "public" records not protected by the Fifth Amendment, despite an express claim of privilege against self-incrimination. We agree with petitioner that the question whether the rule of the *Shapiro* case extends to personal books and records of taxpayers required to be kept under the internal-revenue laws is both serious and important. Cf. *United States* v. *Sullivan,* 274 U. S. 259, 263. We do not agree, however, that that question, which petitioner seeks to raise here, is presented by the facts of this case.

Petitioner is mistaken in his assertion that this case presents the broad proposition whether personal books and records required by law to be kept by taxpayers are outside the protection of the Fifth Amendment. That question would be presented if in this case, as in the *Shapiro* case, petitioner's refusal to produce his records was based on a claim of privilege. It is elementary, as the cases cited by petitioner himself show

(Pet. 11), that the privilege against self-incrimination must be claimed if it is to be given effect. The Government is not arguing that where a claim of privilege against self-incrimination is asserted by a taxpayer with respect to his personal books and records, it should not be respected; on the contrary, the point of this case is that petitioner did *not* claim the privilege when he refused to produce his records at the request of the revenue agents. On the facts of this case, the only question presented is whether the Fifth Amendment prevents the jury from considering such a refusal, unaccompanied by a claim of privilege, as a circumstance bearing on "wilfulness."

The record shows that petitioner's refusal to produce the requested books was not based on a claim of privilege (I R. 18–22). The only possible basis in the record for even implying such a claim is found in the testimony that petitioner's counsel is stated to have said that he would be happy to permit examination of the records "after the criminal aspects of the case are disposed of" (I R. 56). We submit this is not a sufficient assertion of the privilege to support petitioner's argument. "The validity of his justification [for refusing] depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made. The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked." *United States* v. *Murdock,* 284 U. S.

141, 148; cf. *Quinn* v. *United States,* decided by this Court May 23, 1955.

In the absence of a claim of privilege, the refusal, in violation of a taxpayer's statutory duty to make available his records of income (see Sec. 54 (a), Internal Revenue Code of 1939; Treasury Regulations 111, promulgated under the Internal Revenue Code, Sec. 29.54–1, *supra,* pp. 3–4), could be considered by the jury as evidencing "covering up sources of income" and "conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States,* 317 U. S. 492, 499. The jury was entitled to weigh this circumstance, and the decision below is in accord with other decisions on the point. *Myres* v. *United States,* 174 F. 2d 329, 337 (C. A. 8), certiorari denied, 338 U. S. 849; *Olson* v. *United States,* 191 F. 2d 985, 988–989 (C. A. 8).[3]

2. Petitioner challenges the sufficiency of the Government's evidence of the increase in his net worth for the year 1944. He contends that it was improperly submitted to the jury because no cash-on-hand at the starting point was allowed and no evidence negativing its existence was introduced.

[3] In a letter to the Clerk of this Court, which petitioner asks to have considered as a supplement to his petition, it is asserted that the decision of the court below is in conflict with a decision of the Fifth Circuit in *Blumberg* v. *United States,* dated May 13, 1955. However, in that case it was held that the records were voluntarily turned over to the revenue agent.

Petitioner's argument ignores (1) the fact that the investigating agents' "no cash-on-hand" figure was reached after an exhaustive investigation and (2) the fact that no "lead" to, or claim of, expenditure from a pre-existing cash hoard was forthcoming from him during the investigation or at the trial. Indeed, the clear import of the evidence as a whole was that the petitioner's consistently increasing cash position was clearly reflected by his banking transactions. The inference is that proof of the cash asset would have swelled the net worth increase. It is submitted that the net worth proof alone constituted substantial evidence of understated income.

But petitioner's argument can be conclusively disposed of on another ground. In this case it is clear that the Government's net worth proof was intended only to corroborate the receipt of vast sums of unreported income otherwise shown by proof, unchallenged here, of petitioner's banking transactions. The corroborative sufficiency of proof of "visible" increases in net worth coupled with some other indicia of evasive conduct (see *Spies* v. *United States,* 317 U. S. 492, 499; *Holland* v. *United States,* 348 U. S. 121, 125) was upheld by this Court in *Smith* v. *United States,* 348 U. S. 147, 158–159, and *United States* v. *Calderon,* 348 U. S. 160, 166–167. Here there is an unquestioned "visible" increase in net worth far in excess of reported income coupled with a flagrant concealment of the petitioner's principal

income-producing business, his huge illicit gambling enterprise. Such proof was obviously sufficient to go to the jury as corroborative evidence "that petitioner's earnings during the prosecution years exceeded his declared income," *Smith* v. *United States, supra,* p. 159.

CONCLUSION

No question warranting review is presented by the facts of this case. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 73

SAMUEL R. BEARD, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Matters Involved

This reply brief deals with the two matters raised by the brief for the United States in opposition to the petition for a writ of certiorari:

First: the contention that the record shows that petitioner's refusal to produce his records at the request of the revenue agents was not based on a claim of privilege.

Second: the contention that in this case it is clear that the Government's net worth proof was intended only to corroborate the receipt of sums of unreported income otherwise shown by the proof of petitioner's banking transactions.

I.

The Refusal to Produce the Requested Books and Records Was Based on a Claim of Privilege Under the Fifth Amendment

The position of the petitioner in reply to the Government's argument in opposition to the granting of the writ of certiorari is that the record reveals that the refusal to produce the books and records was grounded on the privilege against self-incrimination under the Fifth Amendment.

The record discloses the following:

1. On April 6, 1948, when Agents Ford and Kennedy initially asked for the books and records, Beard replied that he would get the books and records together and call Agent Kennedy in a few days (A. 54, 55). That was the last time the agents talked to Beard.

2. Approximately two weeks later Beard's attorney told Agent Kennedy that Beard would not produce his books and records (A. 18).

3. The agents repeatedly asked Beard's attorney to allow them to see the books and records. Beard's attorney refused the requests and advised the agents that he would be happy to permit inspection of all Beard's records after the criminal aspects of the case had been disposed of (A. 150).

4. The agents understood that the refusal to produce the books and records was based upon a claim of privilege against self-incrimination. The agents respected this claim and elected not to summon or subpoena Beard's books and records. (A. 18, 57).

5. It is the policy of the Internal Revenue Service contained in a directive in the Manual of the Intelligence Unit, Internal Revenue Service, never to issue process to compel the production of records, or the testimony of any individual against whom criminal prosecution is contemplated, because "* * * we would be forcing him to testify against himself * * *" (Transcript p. 681).

6. The United States Attorney adopted the position of the agents as to their reason for not summoning or subpoenaing Beard's records (A. 329).

Both the Trial Court and the Court of Appeals treated this sequence of events as amounting to nothing less than the assertion by the petitioner of his constitutional privilege agaist self-incrimination. The Trial Court's charge, to which the petitioner excepted, permitted the jury to consider these events as an exercise of the privilege (A. 355, 368). The Court of Appeals in its opinion did not discuss the Government's contention, raised for the first time on appeal, that Beard's counsel had not invoked the Fifth Amendment or given any reason for the refusal to produce the books and records. The Court of Appeals decided that Beard's constitutional rights were not violated because the books and records involved were public records and thus fell outside the constitutional protection of the Fifth Amendment under the rule of the Shapiro case.

When all the circumstances surrounding the refusal to produce the books and records are considered, it is abundantly clear why the refusal was considered by the inquiring agents and treated in the courts below as based upon a claim of privilege against self-incrimination. The request for voluntary production was made in the course of a criminal investigation. The request related primarily to gambling income which was conceded to be the sole basis for a criminal charge. The agents understood that Beard was exercising his privilege not to give voluntarily information which would incriminate him and they concluded that a more formal demand for the books and records, by way of summons or compulsory process, would only bring a more formal refusal. Accordingly, the agents decided not to perform a patently useless act. If there was any doubt in their minds as to whether Beard was claiming his privilege they would have used the statutory process for subpoenaing the books and records or they would have proceeded to indict Beard for wilful failure to supply information under Section 145(a) of the 1939 Internal Revenue Code (26 USC Sec. 145(a) 1946 ed.).

The agents accepted the claim of privilege and elected not to exercise the statutory process to compel production of the books and records or to elicit a more particular assertion of the privilege.

This Court has recently held that no ritualistic formula is necessary to invoke the privilege against self-incrimination, and that it is sufficient if the inquiring body is put on notice of an apparent claim of

privilege. It then becomes incumbent upon the inquiring body to accept the claim or to ask the witness whether he is in fact invoking the privilege. *Quinn* v. *United States* (99 L. Ed. Advance p. 565).

The reasoning of that decision is particularly applicable here where not only the inquiring agents accepted the claim of privilege but the United States Attorney also accepted the claim and did not raise the factual issue as to whether Beard had or had not claimed the privilege. The Trial Court instructed the jury on the basis that the existence and valid assertion of the privilege was a concessum in the case.

II.

The Net Worth Was Submitted to the Jury as Proof of Guilt and Not Merely as Corroboration

The Government's assertion on Page 12 of its Brief "that the investigating agent's 'no cash on hand' figure was reached after an exhaustive investigation" is not supported by the record. On the contrary, the record clearly shows that Agent Kennedy made no investigation to determine Beard's cash on hand as of December 31, 1943, the starting period for the net worth (A. 272, 273).

The Government's position that the net worth method was intended only to corroborate the receipt of vast sums of unreported income otherwise shown by proof of petitioner's banking transactions is not supported by the record. The jury was permitted to find a verdict of guilty under the net worth method of proof of income. The Trial Court instructed the jury that it might find the taxpayer guilty under any

of the methods used by the Government (A. 369, 373, 374).

Respectfully submitted,

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The Government respectfully submits that the question discussed in the *amicus curiae* brief of the American Bar Association is not presented for decision by this Court. That question is stated to be: "Are personal records of a taxpayer outside the protection of the Fifth Amendment by virtue of the provisions of the Internal Revenue Code?"

As was conceded in the brief in opposition (p. 9), that question, if it were presented to the Court, would be both serious and important; and the Government would not oppose certiorari

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in this case if it considered that the facts presented that question. Petitioner contends in this Court that his refusal to allow the revenue agents to inspect his books and records, although a violation of his statutory duty (see Brief in Opp., p. 11), could not be considered in evidence against him, and that the trial court erred in instructing the jury that they could so consider it as a circumstance bearing on wilfulness (I R. 368), because such refusal was based on a claim of privilege against self-incrimination and hence was protected by the Fifth Amendment. We repeat, however, that the decisive fact in this case is that petitioner did not claim the privilege against self-incrimination when his counsel refused to produce his records at the request of the revenue agents. The brief in opposition (p. 10) points out the wholly inadequate basis in the record for any inference that such a claim was made. In refusing to produce the records for inspection by the agents, petitioner's counsel stated that, if the Government wished the records, "you know how to get them—by subpoena or summons." (I R. 150.) Had a subpoena or summons been issued, petitioner might well have claimed his privilege. The record, however, reveals nothing more than a bare refusal to produce the records in response to the agents' request.

It should be further noted that at the trial the defendant at no stage contended or even sug-

gested that his refusal to produce the records was based on a claim of privilege. On the contrary, defense counsel contended that the Government could readily have obtained the records by subpoena. (I R. 354, 380.) When the agents testified as to his refusal to produce the records, the defendant made no objection. (I R. 18–22, 56–57, 150.) Nor did he suggest to the trial court that there might possibly be a question—either of fact or of law—whether the refusal was accompanied by an adequate claim of privilege, in which event it might not be considered in evidence against him. Furthermore, when the trial court instructed the jury that the defendant's failure or refusal to produce his records "is a circumstance which may be considered * * * in determining the issue of whether he has wilfully filed a false return" (I R. 368), the defendant did not request the court to charge the jury that they should determine whether his refusal to furnish the records was based on a claim of privilege, and if so, that under the Fifth Amendment they could not properly consider such refusal as a circumstance bearing on wilfulness. In short, the defendant did nothing whatsoever at the trial to assert or support the contention now made, namely, that his refusal to produce the records could not be considered in evidence

against him because it was based on a claim of privilege against self-incrimination.[1]

In these circumstances, it is respectfully submitted that the facts of this case do not raise the serious and important Fifth Amendment question as to which the *amicus curiae* brief of the American Bar Association expresses concern.

SIMON E. SOBELOFF,
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H. BRIAN HOLLAND,
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PHILIP ELMAN,
Assistant to the Solicitor General.

SEPTEMBER 1955.

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[1] As the court below noted, petitioner himself, after having withheld his books from the agents during the investigation, introduced a portion of them in evidence during the trial. He produced, however, only those portions favorable to himself, and the Court of Appeals said (Pet. 18a):

> This observation is especially pertinent in this case where the defendant, although availing himself of his undoubted right to remain silent, nevertheless put in evidence fragmentary portions of the records of his business, admittedly in his possession, but nevertheless withheld the writings which would have given a complete picture of his gambling operations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 73

SAMUEL R. BEARD, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Samuel R. Beard, by his counsel, prays that a rehearing and reconsideration of the Petition for a Writ of Certiorari heretofore filed in this case be had and that the order entered in this Court on October 10, 1955, denying the Petition for a Writ of Certiorari, be revoked.

This Petition for rehearing is based on the grounds that the order denying the Petition for a Writ of Certiorari leaves standing, without an expression from

this Court, a serious question involving due process in a criminal trial and the extension of the doctrine of "public records" as enunciated by the 5 to 4 decision in *Shapiro* v. *United States,* 335 U. S. 1.

I.

This case involves the important question of whether a Federal District Court can effectively nullify a defendant's constitutional right by instructing a jury that the exercise of the constitutional right may be considered by the jury in determining the guilt of the defendant.

The Trial Court clearly instructed the jury that the defendant had a constitutional right not to produce his books and records, but the Court continued his charge by saying that the jury could consider the defendant's failure to produce the books and records in determining his guilt. This instruction was given to the jury in the regular charge and was repeated when the jury, after deliberating for a few hours, requested in writing that the instruction on books and records be repeated. The Trial Court's instruction did not qualify in any manner the defendant's constitutional right not to produce his books and records. The instruction did not mention failure to claim that right or a waiver of the constitutional privilege. Therefore, the Trial Court in effect instructed the jury that a man may exercise his constitutional right but he does so at the risk and hazard that the exercise of his constitutional right may be considered by a jury in determining guilt.

This concept of the law is so novel and strange and so great and infringement on constitutional rights that

it should not stand as the law without a clear opinion from this Court.

The Bill of Rights contemplates that every defendant is entitled to a fair trial. Due process of law requires that the jury determine guilt from the evidence and from a correct instruction on the law from the trial judge. In order to determine whether there was due process of law in this case, we must consider the charges as given to the jury and the effect the charge as given had on the jury composed of laymen.

The question is not whether guilt may be spelled out of the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal courts. *Bollenbach* v. *United States,* 326 U.S. 607; 66 S. Ct. 402.

The issue is not what effect the error has on an Appellate Court or even this Court, but rather what effect the instruction had on the mind of the jury, *Kotteakos* v. *United States,* 328 U.S. 750, 763, 765; 66 S. Ct. 1239, 1247.

At the present time, an instruction by a Trial Court to a jury that the exercise of any constitutional right by a defendant may be considered in determining the defendant's guilt is a proper instruction. To permit that instruction to stand as proper and correct would mean that constitutional rights can only be exercised at the risk and hazard that such action is evidence of guilt. We respectfully submit that this should not be the law unless and until this Court says so in clear and unmistakable words that can be read by all.

If it is to be the law of this land that a man can exercise the rights given him by the Constitution only

at the risk of having such action considered as evidence of guilt, as the jury was instructed in this case, then it should be enunciated by the Supreme Court of the United States and not by a District Court in Baltimore.

II.

The denial of the Petition for a Writ of Certiorari leaves standing as the law today the decision of the Court of Appeals for the Fourth Circuit that the protection of the Fifth Amendment does not apply to a person's books and records required to be kept by the Internal Revenue Laws. That Court found no error in the Trial Court's charge, even though the Trial Court expressly instructed the jury that the defendant's books and records were protected by the Fifth Amendment.

The Court of Appeals flatly and categorically decided that there is no constitutional protection for the personal books and records required to be kept by the Internal Revenue laws. It did not concern itself with failure to claim privilege or waiver of privilege; it decided clearly that there was no protection under the Constitution and extended the "public records" doctrine of the *Shapiro* case to the personal books and records of an individual required to be kept by the Internal Revenue Laws.

Whether the doctrine of the *Shapiro* case, a 5 to 4 decision of this Court, should be extended is an important question which should be clearly resolved by this Court and not one of the Circuit Courts of Appeals.

We sincerely urge consideration of the following statement contained on page 5 of the Brief of the

American Bar Association as Amicus Curiae previously filed in this case:

> "This ruling announced by the court below is novel; as the petitioner points out, it is in conflict with tacit assumptions of courts even after the decision in the Shapiro case, it is far reaching in its effect, and it is uncertain in the scope of its application. To determine its correctness the writ of certiorari prayed for should issue."

For the reasons stated the petitioner prays that the order denying the Petition issued on October 10, 1955, be revoked and that a Writ of Certiorari be issued.

Respectfully submitted,

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of Counsel.

I hereby certify that this petition for rehearing is presented in good faith. The defendant is serving his sentence in prison so there is no element of delay as a purpose in filing this petition.

MICHAEL GOULD,
Washington, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 73

SAMUEL R. BEARD,

Petitioner,

vs.

UNITED STATES OF AMERICA.

IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Because of the importance of the constitutional question presented by this case and its impact on standards governing the administration of criminal justice, the American Bar Association, by its Standing Committee on Bill of Rights, as *amicus curiae* respectfully submits this brief in aid of petition for certiorari.

Question Involved

Are personal records of a taxpayer outside the protection of the Fifth Amendment by virtue of the provisions of the Internal Revenue Code?

Statement of the Case

Petitioner was convicted of income tax evasion. In the course of the preliminary investigation of this case the petitioner, through his attorney, refused to turn over his records to an agent of the Bureau of Internal Revenue "until the criminal aspects of the case were disposed of." The demanding agent understood this to be an invocation of the Fifth Amendment. The Bureau of Internal Revenue did not take any of the steps provided by law (Title 26 U. S. C. 1946 ed., Secs. 3614(a) and 3633(a)) to vindicate a possible right to compulsory production of the records.

The Trial Court instructed the jury that a taxpayer had the right under the Fifth Amendment "to refuse to surrender or allow inspection of his books and records." The Court, however, went on to instruct the jury that it may consider the refusal as a circumstance in determining the issue of guilt. The Court of Appeals for the Fourth Circuit held that the instruction was proper because it related to records which were required to be kept by the taxing statute, and consequently that the Fifth Amendment did not apply.

Reasons for Granting the Writ

In opposing the granting of the writ, the Solicitor General has suggested that the important constitutional question does not arise in this case because the petitioner did not properly invoke the protection of the Fifth Amendment. In *Quinn* v. *United States,* U. S. , 99 L. Ed. (Advance, pp. 565, 572), this Court held that "any language that may reasonably be expected to be understood as an attempt to invoke the privilege, is sufficient to invoke its protection." The language of petitioner's at-

torney was in fact so understood and the question whether the petitioner is entitled to the protection of the Fifth Amendment is squarely posed.

The Court below justified its conclusion that the records were beyond the protection of the Fifth Amendment by reliance on *Shapiro* v. *United States,* 335 U. S. 1. In its view, the case established a general principle not dependent for its application on the background of the statute there involved. However, the majority of this Court relied heavily on the legislative history of the Emergency Price Control Act. It was a war-time mobilization measure which Congress deemed necessary for national survival in a total war. As the then Chief Justice observed (335 U. S. at pp. 10, 11):

> "It is significant to note that the Senate Committee on Banking and Currency began its consideration of the bill on December 9, 1941, the day after Congress declared the existence of a state of war between this country and the Imperial Government of Japan."

The exigencies of war inevitably require restrictions on liberty which would be considered intolerable in times of peace. The proponents of the measure represented to the Senate Committee on Banking and Currency that shorn of the provisions for record-keeping the Administrator would be substantially without enforcement powers. The need for securing testimony ordinarily privileged under the Fifth Amendment is further illustrated by the willingness of Congress in Section 202(g) of the Emergency Price Control Act to grant immunity from prosecution to offenders rather than to dispense with their testimony. The overriding need for enforcement of a war-time statute carried with it the power of Congress to make public what would ordinarily be private documents.

The same considerations are not applicable to the income tax statute. In its modern form it has been a part of the law for over forty years. It has been successfully enforced and vast sums of money for the needs of the federal government have been raised pursuant to it. Yet in all this time the Government has never attempted to assert the power to compel from individual taxpayers the production of records which might incriminate them. Nor has Congress seen fit to grant immunity to taxpayers who might otherwise incriminate themselves by testimony which they could be compelled to give. Even if abstract reasoning should suggest that the income tax could not be enforced without the compulsory production of incriminating documents, forty years enforcement experience conclusively refutes such reasoning.

The holding of the Court below cannot be justified on the ground of necessity, but assumes a blanket power of Congress to make public what would ordinarily be private records to insure the convenience rather than the necessity of carrying out a legitimate legislative objective.

Mere convenience of law enforcement should not be sufficient to justify unlimited invasions of privacy. The danger that the principle announced by the *Shapiro* case would expand itself to cases of convenience rather than necessity was noted by the minority in the *Shapiro* case. As the late Mr. Justice Jackson put it (335 U. S., at p. 71):

> "It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to."

The Bill of Rights, however, establishes the principle that convenience of law enforcement is not the paramount

consideration in a free society. *Quinn* v. *United States, supra,* (per Warren, C. J., at p. 571) quotes with approval language from *Twining* v. *New Jersey,* 211 U. S. 78, 91, to the effect that the Fifth Amendment deliberately sacrifices the prosecutor's convenience. In the light of its development and purpose it must not be applied "narrowly or begrudgingly" (*ibid*). Yet, if the views of the Court below were accepted, few, if any, documents would still be private enough to come under the protection of the Fifth Amendment or, perhaps, still be private enough to be protected against the illegal searches and seizures under the Fourth Amendment. Cf. *Davis* v. *United States,* 328 U. S. 582.

The income tax laws apply to all legal, and most, if not all illegal, activities which involve gain or loss. If Congress without urgent necessity can require taxpayers to keep and produce records of so much of their activities, we are no doubt close to the prosecutor's paradise envisaged by Mr. Justice Jackson. The Bill of Rights plainly meant to forestall the possibility that the convenience of policemen and prosecutors would measure the extent of liberty and privacy for private citizens to enjoy. In the words of Mr. Justice Jackson (*ibid*) it contemplated that the Government "lose some cases rather than the people lose their immunities." Similarly, Mr. Justice Frankfurter, dissenting in the *Shapiro* case (335 U. S. at p. 69) observes that the fact that "* * * law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated * * *" is no justification for doing away with the right of privacy or the constitutional privilege.

The ruling announced by the Court below is novel; as the petitioner points out, it is in conflict with tacit assumptions of courts even after the decision in the *Shapiro*

case, it is far-reaching in its effect, and it is uncertain in the scope of its application. To determine its correctness, the writ of certiorari prayed for should issue.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

against

UNITED STATES OF AMERICA.

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above *amicus curiae* brief may be filed in this proceeding with the Supreme Court of the United States.

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